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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

SHAWN DJ TENBRINK,

Defendant and Appellant.

F076668

(Super. Ct. No. CRF47670)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Amanda D. Cary and Ian Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Peña, Acting P.J., Meehan, J. and Snauffer, J.

INTRODUCTION

Appellant Shawn DJ Tenbrink stands convicted of violating Health and Safety Code¹ section 11379.6, subdivision (a), manufacturing by chemical extraction a controlled substance, in this case hash oil or honey oil. He contends the evidence is insufficient to sustain this conviction. We affirm the conviction.

Tenbrink also admitted two Penal Code section 667.5, subdivision (b) enhancements, which the abstract of judgment erroneously reflects as Penal Code, section 667.5, subdivision (a) enhancements. The trial court also stayed imposition of punishment on these enhancements. Because Penal Code section 667.5, subdivision (b) enhancements must be imposed or stricken, but not stayed, we will remand for the trial court to exercise its discretion and direct the preparation of an amended abstract of judgment.

FACTUAL AND PROCEDURAL SUMMARY

Tenbrink was charged in count 1 with violating section 11379.6, subdivision (a), manufacturing, processing, or preparing by chemical extraction a controlled substance; and in count 2 with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). It also was alleged that Tenbrink had a prior strike conviction and had served two prior prison terms.

Testimony at trial established that on July 9, 2015, Tuolumne County Sheriff's Deputies were dispatched to Tenbrink's residence. Deputy Joseph Morton testified that when he arrived at Tenbrink's residence, Tenbrink was in the driveway holding a glass jar of marijuana. Tenbrink had a medical marijuana card in his pocket. A woman, Brook Chester, was also at the house.

¹ References to code sections are to the Health and Safety Code, unless otherwise specified.

In a search of the residence, Morton found a blue tub with a lid in the closet of one bedroom; the lid was fastened to the tub. Morton removed the lid and examined the contents of the tub. Inside were “marijuana shake,” a metal tube, and four cans of butane. One of the cans of butane was empty and had a bent nozzle. Marijuana shake was described as the trimmings from cultivation of marijuana; the trimmings “contain parts of the active ingredient of what gets people high.”

When asked whether the tub and materials belonged to him or Chester, Tenbrink responded the materials were his. Tenbrink acknowledged that there was butane, “weed,” and a tube inside the tub. Tenbrink indicated the tub was used for “making hash.”

A usable quantity of methamphetamine was found in a search of the garage. Tenbrink admitted he had used methamphetamine and that if a urine test was administered, it would be “dirty.”

Sergeant Victor Serrano, Jr., testified as an expert on the production of hash oil, or honey oil. Serrano examined the tub and contents. The copper tube had multiple holes drilled into the side and was packed with marijuana; the bottom end had a cap on it; and there were hose clamps. To create “hash oil” or honey oil, someone would simply need to run either propane or butane through the tube. One end of the tube had a device that would allow for propane or butane to be poured into the tubing. Butane could be poured through a fitting designed for propane. Serrano opined that the marijuana shake, tubing, butane, tub, and hose clamps all constituted a lab “somewhere in the process of manufacturing honey oil.”

Based upon the amount of marijuana in the tube, Serrano opined it would take about 15 minutes to pour butane through and create hash oil by using the device. In Serrano’s opinion, there was no other use for the tubing other than to make hash oil. The marijuana in the tube was dry, so Serrano could not determine whether Tenbrink had already used it to make hash oil. Serrano testified ten pounds of shake would probably

yield one to two pounds of honey oil. Honey oil is very potent and has a high dollar value.

Chester testified she was Tenbrink's girlfriend and living with him at the time of his arrest. She had never seen Tenbrink make hash oil or use methamphetamines. He did smoke marijuana. Chester testified the tub and contents belonged to a man named Ryan Thomas.

Another defense witness, Josh Kelly, claimed he overheard Thomas state he needed a new place to stay because Tenbrink had been arrested because of "some stuff" Thomas had left at Tenbrink's house.

The jury found Tenbrink guilty of counts 1 and 2. Tenbrink admitted the prior strike and prior prison term enhancements.

At sentencing, the trial court imposed a term of five years for the count 1 offense, doubled to ten years because of the prior strike. On count 2, a term of one year to be served concurrently with the count 1 term was imposed. A term of one year was imposed for each of the Penal Code section 667.5, subdivision (b) enhancements admitted by Tenbrink, but then stayed. An aggregate term of 11 years and four months in prison was imposed, including the term imposed for a Penal Code section 1350.5 conviction for failure to appear while on bail. Tenbrink filed a timely notice of appeal.

DISCUSSION

Tenbrink contends the evidence is insufficient to sustain his conviction for violating section 11379.6, subdivision (a). He also contends the abstract of judgment must be corrected to reflect that he admitted Penal Code section 667.5, subdivision (b) enhancements, not subdivision (a). The People maintain that because the trial court stayed the Penal Code section 667.5 enhancements, the matter must be remanded for the trial court to exercise its discretion to impose or strike the enhancements, because they cannot be stayed.

I. Section 11379.6

Tenbrink contends the evidence was insufficient to sustain his conviction under section 11379.6, subdivision (a). We disagree.

Standard of Review

The applicable legal principles are settled. The test of sufficiency of the evidence is whether, reviewing the whole record in the light most favorable to the judgment below, substantial evidence is disclosed such that a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578 (*Johnson*); accord, *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) Substantial evidence is that evidence which is “reasonable, credible, and of solid value.” (*Johnson, supra*, at p. 578.) An appellate court must “presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Reilly* (1970) 3 Cal.3d 421, 425.) An appellate court must not reweigh the evidence (*People v. Culver* (1973) 10 Cal.3d 542, 548), reappraise the credibility of the witnesses, or resolve factual conflicts, as these are functions reserved for the trier of fact (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 367). Before a judgment can be reversed on this ground, “it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support [the verdict].” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) Thus, “[w]here the circumstances support the trier of fact’s finding of guilt, an appellate court cannot reverse merely because it believes the evidence is reasonably reconciled with the defendant’s innocence.” (*People v. Meza* (1995) 38 Cal.App.4th 1741, 1747.) This standard of review is applicable regardless of whether the prosecution relies primarily on direct or on circumstantial evidence. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1125.)

Analysis

To prove a violation of section 11379.6, subdivision (a), the People must show the defendant: (1) directly or indirectly manufactured a controlled substance using chemical

extraction; and (2) knew of the substance's nature or character as a controlled substance. (§ 11379.6, subd. (a); CALCRIM No. 2330; *People v. Coria* (1999) 21 Cal.4th 868, 874, 880-881.) The production of concentrated cannabis, known as honey oil, through butane oil extraction qualifies as the manufacture of a controlled substance by "chemical extraction" within the meaning of section 11379.6, subdivision (a). (*People v. Bergen* (2008) 166 Cal.App.4th 161, 169, 172-173.)

Section 11379.6, subdivision (a) states in relevant part that "every person who manufactures, compounds, converts, produces, derives, processes, or prepares, either directly or indirectly by chemical extraction or independently by means of chemical synthesis, any controlled substance" is guilty of an offense punishable by three, five, or seven years in prison. Section 11379.6, subdivision (a) "criminalizes participation in each and every stage of the manufacturing process, 'from inception through completion.' " (*People v. Luna* (2009) 170 Cal.App.4th 535, 543 (*Luna*), quoting *People v. Stone* (1999) 75 Cal.App.4th 707, 715 (*Stone*).) In addition, a defendant need not have completed the process; a conviction can be upheld even when no completed product is found. (*People v. Lancellotti* (1993) 19 Cal.App.4th 809, 811 (*Lancellotti*); *People v. Jackson* (1990) 218 Cal.App.3d 1493, 1503-1504 (*Jackson*).)

In *Lancellotti*, a search was conducted of the defendant's storage locker and "virtually all the equipment needed to produce methamphetamine" was found, including a chemical precursor to methamphetamine and two catalysts used in the process. (*Lancellotti, supra*, 19 Cal.App.4th at p. 812.) The defendant argued there was insufficient evidence to convict him of manufacturing. (*Id.* at p. 811.) The appellate court affirmed the conviction, emphasizing that section 11379.6, subdivision (a) "encompasses the initial and intermediate steps carried out to manufacture, produce or process" a controlled substance. (*Id.* at p. 813.)

Here, there was sufficient evidence that Tenbrink was engaged in conduct proscribed by section 11379.6, subdivision (a); he had butane, marijuana, and apparatus to complete the chemical extraction of hash oil. The items commonly used in the process of manufacturing hash oil were found at his residence, namely a copper pipe with multiple holes and stuffed with marijuana, clamps for the ends of the pipe, a tub, and butane. Tenbrink admitted during the search of his residence that these items belonged to him. The items could be used immediately to complete the manufacturing process in about 15 minutes, by running butane through the copper tube.

The terms “manufactures,” “produces,” and “processes,” as used in section 11379.6, “entail notions of the ongoing and progressive making, assembly or creation of an item by hand or machine.” (*Jackson, supra*, 218 Cal.App.3d at p. 1503.) Tenbrink had assembled the apparatus to extract hash oil, loaded the copper tube with marijuana, and had butane on hand and ready for use. Taken together, this evidence was sufficient to establish the manufacturing process had occurred or was in progress.

Tenbrink argues the evidence shows only mere preparation and no act beyond preparation that would support a conviction under section 11379.6, subdivision (a). He relies on *Luna* to support his contention. *Luna* is readily distinguishable. In *Luna*, police found components of equipment used to manufacture hashish in the bed of the defendant’s truck. The components were unassembled, and defendant lacked a sufficient quantity of marijuana to begin the process. (*Luna, supra*, 170 Cal.App.4th at pp. 538-539, 543.) Here, Tenbrink had all the items necessary for the manufacturing of hash oil, had assembled the apparatus, and packed the tube with marijuana. Tenbrink had recently completed, or was about to complete, the manufacturing process. Unlike the defendant in *Luna*, Tenbrink had gone beyond the mere collection of items.

Moreover, a reasonable inference can be drawn that the manufacturing process had been completed; there was an empty canister of butane with a bent nozzle in the tub with the tube packed with marijuana. The statute does not state that the manufacturing must

have occurred within a particular time frame. (*People v. Pierson* (2001) 86 Cal.App.4th 983, 990; *Luna, supra*, 170 Cal.App.4th at p. 542; *People v. Bergen, supra*, 166 Cal.App.4th at pp. 169, 171; *Stone, supra*, 75 Cal.App.4th at pp. 713-714; *People v. Heath* (1998) 66 Cal.App.4th 697, 705; *Lancellotti, supra*, 19 Cal.App.4th at pp. 812-813; *Jackson, supra*, 218 Cal.App.3d at pp. 1503-1504.)

To the extent Tenbrink was claiming the marijuana and apparatus belonged to a third party, Thomas, “ ‘[t]he inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence’ ” (*People v. Small* (1988) 205 Cal.App.3d 319, 326.) The evidence was sufficient to prove that Tenbrink had dominion and control over all the items necessary to produce hash oil by the butane extraction method; the items were in the bedroom of his residence.

II. Penal Code Section 667.5 Enhancements

Tenbrink pled to two Penal Code section 667.5, subdivision (b) enhancements. At sentencing and in the abstract of judgment, the trial court mistakenly references Penal Code section 667.5, subdivision (a). Consequently, the abstract of judgment will need to be corrected to reflect the proper subdivision.

However, the trial court also stayed imposition of the punishment for the prior prison term enhancements. This constitutes an unauthorized sentence, as Penal Code section 667.5, subdivision (b) enhancements must be imposed or stricken; they may not be stayed. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241; *People v. Jones* (1992) 8 Cal.App.4th 756, 758.)

The People argue that the matter must be remanded because the trial court must either impose or strike the Penal Code section 667.5, subdivision (b) enhancements and if it strikes the enhancements, the trial court must state its reasons for doing so. (*People v. Jordan* (2003) 108 Cal.App.4th 349, 368-369.) Although the trial court stated it was staying imposition of punishment on the prior prison term enhancements pursuant to

Penal Code section 1385, this section provides for an enhancement to be stricken, not stayed.

Therefore, we will remand the matter for the limited purpose of having the trial court exercise its discretion to impose or strike the two Penal Code section 667.5, subdivision (b) enhancements. Once the trial court has exercised its discretion to either impose or strike the enhancements, it shall prepare and disseminate a corrected abstract of judgment.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion to either impose or strike the Penal Code section 667.5, subdivision (b) enhancements. In all other respects, the judgment is affirmed. After the proper exercise of the trial court's discretion, it shall cause an amended abstract of judgment to be prepared and disseminated to the appropriate authorities.